APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 246 and 247—September Term, 1963.

(Argued November 20, 1963. Decided December 18, 1963.)

Docket Nos. 28563 and 28564

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DERIENZO, MILTON FAROWITZ and MATT GILLESPIE,

Plaintiffs-Appellees,

— against -

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs-Appellees,

— against —

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant-Appellant.

Before:

MEDINA, WATERMAN and MARSHALL, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York, Richard H. Levet, *Judge.*

American Federation of Musicians of the United States and Canada and Associated Musicians of Greater New York, Local 802, appeal, respectively, from two summary judgments granted in consolidated actions holding invalid the action of the June 1963 Convention of the Federation increasing dues. Opinion below reported at ——F. Supp. ——. Affirmed.

MEDINA, *Circuit Judge*:

As a result of our decision in *Cutler* v. *American Federation of Musicians*, 2 Cir., 1963, 316 F. 2d 546, cert. denied, December 9, 1963, —— U.S. ——, holding invalid the 10 per cent travelling surcharge imposed by certain provisions of the By-laws and Constitution of the Federation, an attempt was made to supply funds deemed necessary to take the place of the travelling surcharge by presenting for adoption at the ensuing Annual Convention of the Federation held in June, 1963, a resolution increasing per capita membership dues. When this resolution was passed these consolidated actions were brought by individual members of the unions to challenge the validity of the dues increase on the ground that it ivolated the provisions of the Labor-Management, Reporting and Disclosure Act of 1959, Section 101(a)(3)(B), 29 U.S.C., Section 411(a)(3)(B). Judge Levet sustained this contention and held the action of the Convention in passing the increase of dues resolution void, on the ground that the Act required that each delegate cast only one vote, whereas the roll call method pursued at the Convention allowed the votes of the delegates to be weighted in such manner as to count as votes by the number of members in the locals represented by the delegates, and not by counting the vote of each delegate as a single vote. His opinion, *Wittstein* v. *American Federation of Musician*, S.D.N.Y., 1963, is reported at —— F. Supp. ——. Numerous other miscellaneous points are raised, especially in the brief of appellees, but, as we agree with Judge Levet on the principal question of law involved, we do not find it necessary to discuss the other points.

The two cases were disposed of by summary judgments for plaintiffs. In *Wittstein, et al.* v. *American Federation of Musicians of the United States and Canada* the judgment is final. In *Schwartz, et al.* v. *Associated Musicians of Greater New York, Local 802, American Federation of Musicians of the United States and Canada*, only the first count of the complaint was dismissed, as other questions than those discussed in this opinion were raised, but Judge Levet made the customary finding and order prescribed by Rule 54(b) of the Federal Rules of Procedure. Thus appeals by the Federation and by Local 802 are properly before us.

The controlling language of the 1959 Act, Section 101 (a)(3)(B), 29 U.S.C., Section 411(a)(3)(B), applicable specifically to "Dues, Initiation Fees, and Assessments" provides that rates of dues and initiation fees payable by union members shall not be increased except

> "(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

These provisions apply to the Federation, which is a labor organization other than a local labor organization or a federation of national or international labor organizations within the meaning of the Act, and the Federation is conceded to be a labor organization in an industry affecting commerce as defined in Section 3(i) of the Act, 29 U.S.C., Section 402(i).

Article 5 of the Federation's Constitution contains the basic rules governing "Representation and Delegates," as follows:

> "All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

And the By-laws, in Article 28, relating to Convention Proceedings and the order of business at such conventions, prescribe

> "Section 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided,

and the manner of voting shall be viva voce, unless otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution."

The procedure followed at the June, 1963 Convention followed this pattern to the letter. We find nothing to support appellees' protestations to the controry. Two voice votes of the delegates were inconclusive, there was a demand by five locals or more for a roll call. At the roll call the votes of the delegates were weighted in such fashion as to record in favor of or against the resolution not the number of delegates but the number of members of the local represented by the delegates. Thus Local 802, represented by two delegates,[1] cast 28,438 votes against the resolution.[2]

As we read the Constitution and the By-laws, the decisive vote was required to be by roll call, on proper demand, and such a demand must be complied with, irrespective of the result of any prior voice or standing vote. Thus, even if the voice vote had been clearly one way or the other, and even if a standing vote thereafter taken had been equally plain for all to see, the roll call, on proper demand, would decide the issue. Otherwise the provisions of the Constitution and By-laws make no sense. Indeed, we have no reason to doubt that a proper demand for a roll call would have to be acceded to, even if made prior to the taking of any voice or standing vote.

Moreover, as appellants claim to be the case, the weighted voting is to all appearances the most "democratic" method, in the sense that each member is duly "represented," and

[1] Local 802 was entitled under the Federation's Constitution to three delegates.

[2] As not affecting the result, in the view we take of the applicable law, we do not discuss the split or duplicate votes cast at the 1963 Convention.

it is a method of voting widely recognized as fair and proper by a number of unions. Not only are similar provisions to be found, with some variations of detail, in many representative union constitutions or by-laws, but it may fairly be said that the passage of the Labor-Management, Reporting and Disclosure Act of 1959 was not brought about by any abuses found to have flourished under the aegis of the weighted voting system.

We think what we have just said clears the air. We may now leave aside confusing irrelevancies and digressions and address ourselves to the simple, central issue: in the context of Section 101(a)(3)(B), 29 U.S.C., Section 411 (a)(3)(B), do the words "by majority vote of the delegates voting at a regular convention" mean one vote for each delegate?

As we are unable to perceive any other meaning attributable to the phrase, we hold: that each delegate at the 1963 Convention was entitled to one vote, no more, no less; that the resolution as passed was void, as violative of the plain requirements of the Act; and that the judgments appealed from must be affirmed.

The Act thus construed does not "virtually disenfranchise thousands of appellants' members" as the satute provides an alternative method of increasing dues by referendum, in which case the issue would be determined "by majority vote of the members," rather than "by majority vote of the delegates." Voting by stockholders of corporations is not, we think, an analogous situation. The same is true of methods prescribed by the federal or state constitutions or by legislation for the nomination or election of various public officials. Nor is it of significance that Title IV of the Act apparently permits the election of officers of unions by a weighted vote. The considerations the Congress may well have thought relevant to election of officers on the one hand, and raising dues at regular conventions, on the other, are not the same.

True it is that the Bill of Rights, so-called, in Section 101(a)(1), 29 U.S.C., Section 411(a)(1), is "subject to reasonable rules and regulations in such organization's constitution and by-laws." And Section 103, 29 U.S.C., Section 413, provides that nothing in Title I, "Bill of Rights of Members of Labor Organizations," shall limit the rights or remedies of members of unions under any State or Federal law, "or under the constitution and bylaws of any labor organization." But these provisions are of no avail to appellants, for two reasons. In the first place, Section 101(b), the very Section prescribing a "majority vote of the delegates voting at a regular convention" for an increase of dues, states: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with this section shall be of no force and effect." In the second place, no requirement of a weighted vote could possibly be considered "reasonable," in the face of a statutory requirement of one vote for each delegate.

It is surprising that appellants should also rely upon the McClellan Bill and the Barden Bill, each of which specifically allowed weighted voting. S. 1137, 86th Cong. 1st Sess., Section 102(2) (1959); H.R. 4473, 86th Cong. 1st Sess., Section 102(b)(3) (1959). These bills were rejected.

Everyone seems to agree that the Labor-Management, Reporting and Disclosure Act was "to insure union democracy," and that the intended beneficiary of the provisions of the Act is the union member. O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 257 (1959). But the natural inference to be drawn from a reading of the Act, especially the portion relating to increases in dues, initiation fees, and assessments, is that the specific enumeration of methods of proposing and voting for such increases is intended to be exclusive. One need not be steeped in the historical data affecting the uses and abuses of labor organizations to realize that any complicated system of proposing and voting for increases in dues,

initiation fees and assessments is subject to manipulation, to the disadvantage of the individual union member. We hold that the simple, unambiguous requirements set forth in Section 101(a)(3)(B) were intended to mean just what they appear on their face to mean, and that in this way the Congress intended to prevent future skulduggery of every possible character and description in the fertile field of increasing dues, initiation fees and assessments, even if no particular abuses in the matter of weighted voting for such increases had been proved.

Other contentions by the respective parties have not been overlooked.

Affirmed.

Judge Marshall dissents and will file an opinion in a few days.

MARSHALL, *Circuit Judge* (dissenting) (filed December 23, 1963):

I must respectfully dissent from the opinion of my brothers. Like them, I recognize that a weighted voting system appeared in many representative union constitutions prior to the enactment of the Labor-Management Reporting and Disclosure Act of 1959,[1] and that the statutory provision in question "was not brought about by any abuses found to have flourished under the aegis of that system."[2] My disagreement is only with the conclusion that the words "by majority vote of the delegates voting" were intended and must be construed to invalidate this common and concededly fair method of delegate voting at union conventions, insofar as it is used to approve dues increases.[3]

I think it is fair to say that the majority decision rests principally on the so-called "plain meaning rule," i.e., that the statutory phrase is capable of but one interpretation. My brethren recognize, as noted above, that elimination of the weighted voting system was not consciously put forward as a goal of the Act, whose main thrust was to correct the flagrant abuses of power by some union officials which had been uncovered by extensive Congressional

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[1] 73 Stat. 522, 29 U. S. C. § 401 et seq.

[2] See Leiserson, American Trade Union Democracy 122 (1959).

"Through a representative body, the typical convention is identified with the union itself as if it were a general meeting of all the members. On roll call votes, the full membership of each local union is voted by its representatives in some conventions. In most, the same plebiscite effect is achieved by the delegates from each local casting a fixed number of votes proportionate to its membership."

[3] Throughout this opinion, the word "weighted" is restricted to the method whereby delegates vote proportionate to the membership of the locals they represent. Nothing herein is to be construed as a blanket approval of all methods of weighted voting.

investigations. Nor does any reason readily suggest itself for barring the weighted ballot system in connection with dues increases voted at union conventions but in no other respect. It is clear that, with regard to election of officers and, indeed, any other action taken at these conventions, the system is perfectly acceptable. Cf. § 401(f) of the Act, 29 U.S.C. § 481(f). "I can find no support for the majority's suggestion that dues increases are a particularly 'fertile field' for 'skulduggery,' to which an especially strict standard should be applied."

We are left then, with the "plain meaning" rule as the only real basis for the majority decision. Conceding that the crucial phrase, taken in isolation, most naturally bears the majority's interpretation of it, I do not believe that any other reading is absolutely barred. The term used is "majority vote of the delegates voting," not "vote of a majority of the delegates voting." It bears the interpretation, perhaps not without some strain, that delegates may have differing voting strength, depending on the size of the locals which they represent. Where there are compelling reasons to give such interpretation, and none to give the more apparent one, it is open to us to do so. The plain meaning rule, after all, "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, *J.*). Again, it has been said that "words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination.'" *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1943). Of course, the "rule" has an important place as a canon of construction and I do not wish to contest the general proposition that the language actually chosen is the most reliable guide to the legislature's intention. But it is a myopic view, and one oblivious of precedent, that shuts us off from consideration of the purposes intended to be served by legislation in a case where the "plain meaning" rule leads to incongruous and

even unjust results. See, e.g., *United States* v. *American Trucking Assn.*, 310 U.S. 534 (1940); *United States* v. *Dickerson*, 310 U.S. 554 (1940); *United States*, v. *N. E. Rosenblum Truck Lines*, 315 U.S. 50 (1942); *N. L. R. B.* v. *Lion Oil Co.*, 352 U.S. 282 (1957); *J. C. Penney Co.* v. *Commissioner*, 312 U.S. 65 (2 Cir. 1962).

Of the many provisions of the LMRDA, section 101(a)(3) was one of the least controversial. It first appeared in an amendment offered by Senator McClellan on the Senate floor to add a "Bill of Rights" to the labor reform bill which had been reported by the Senate Committee on Labor and Public Welfare (S. 1555, 86th Cong., 1st Sess.). See 105 Daily Cong. Record 5810 (April 22, 1959), reprinted in 2 N. L. R. B. Legislative History of the Labor-Management Reporting Disclosure Act of 1959, 1102 (1959).[4] Senator McClellan's amendment provided that in the case of a national labor organization the rates of dues should not be changed, and no new dues, initiation fees or assessments imposed except by a majority vote of the delegates present at a duly constituted convention. Senator McClellan explaining this part of his amendment, said only that

> In other words, the dues or the initiation fees cannot be increased, as they have been in certain instances. For example, if certain jobs come along, the initiation fees are hiked up. Some of the new members get the new jobs, and the old members who have been members for a long time, get no assignment to work. That has happened in my State, and it is happening in other States, too. It is not right; it is wrong. 2 *Leg. Hist.* 1104.

There was no further floor discussion of this part of the amendment prior to the vote on it. On April 24, 1959, Senator Kuchel offered an amended "Bill of Rights" title which reworded most of the provisions to eliminate ambiguities and overly broad languages in some of them.

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[4] Hereinafter cited as *Leg. Hist.*

The paragraph dealing with dues increases was amended to provide three methods of increasing dues: (1) majority vote of the members at a meeting or (2) a referendum through the mails or (3) in the case of a national or international organization, "by majority vote" at a regular or duly constituted special convention. Senator Kuchel offered no explanation of the changes in this provisions, indicating that it was taken "almost verbatim from that part of the McClellan amendment which was applicable * * *" 2 *Leg. Hist.* 1232. Again, there was no further floor debate until the revised "Bill of Rights" was passed.

The bill then moved to the House. As is well known, three versions of the Labor Reform Bill, H.R. 8342 (the Elliott Bill, reported by the Committee on Education and Labor), H.R. 8400 (the Landrum-Griffin Bill, which was ultimately adopted on the floor) and H.R. 8490 (the Shelley Bill, generally favored by organized labor) were the most important ones considered. The relevant language of all three bills was identical, and was the language finally enacted into law. The principal changes from the Senate version were that only dues increases, rather than all changes in dues, were required to be submitted to membership action, that a referendum vote was specifically authorized for both local and national labor organizations, and that executive boards of national unions were authorized to make interim increases until the next regular convention of the organization. These changes were apparently made in response to criticisms of the Senate Bill voiced by representatives of organized labor at hearings before the House Committee on Education and Labor.

The purpose of the section was expressed in various ways, but emphasis was always placed on ensuring members the "right to participate in deciding upon the rates of dues" (H. Rep. No. 751, 86th Cong., 1st Sess. 7); or "to control membership and other fees charged by the union" (*id.* at 78); or to "protect against exorbitant rates

or arbitrary changes in dues and fees." 2 *Leg. Hist.* 1520 (remarks of Rep. Griffin).

It seems to me clear that Congress intended merely to assure that dues increases could not be imposed by irresponsible or arbitrary union leaders not answerable in any way to the membership at large. It did not set out to dictate to unions a particular method for voting by delegates at national conventions, and, especially, did not have any desire to foreclose national unions from giving more weight to their larger locals on this question. Under the majority's interpretation of this provision, the only way a national union could do this, and still give even small locals at least one delegate, would often be to increase the number of delegates and the expense of holding conventions, out of all manageable proportions. In the instant case the size of Federation locals varied from 20 (Local 629, Waupaca, Wisc.) to 28,000 (Local 802, New York City), so that a fully proportional system of representation would require some 14,000 delegates in an organization with 280,000 members.

In summary, then, I am most reluctant to employ the "plain meaning" rule here as a means of preventing the use of a perfectly normal and accepted means of voting at union conventions, especially since there is no evidence that Congress felt this method was subject to any abuse whatsoever. It is noteworthly that none of the Congressmen and Senators who discussed the bill ever adverted to this problem, or indicated in any way that a change in the practice was desirable. The same is true of the many commentators who have exhaustively analyzed the provisions of the Act, from every possible standpoint. The term "majority vote of the delegates voting" is susceptible to a construction which would allow delegates' votes to be weighted in accordance with the strength of the different locals they represent. We ought to accept that construction, and reverse the summary judgment herein.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and sixty-three.

Present: HON. HAROLD R. MEDINA,

HON. STERRY R. WATERMAN,

HON. THURGOOD MARSHALL,

Circuit Judges.

EDDIE WITTSTEIN, ET AL., *Plaintiffs-Appellees,*

v.

AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and sixty-three.

Present: Hon. Harold R. Medina,

Hon. Sterry R. Waterman,

Hon. Thurgood Marshall,

Circuit Judges.

Julius Schwartz, et al., *Plaintiffs-Appellees,*

v.

Associated Musicians of Greater New York, Local 802, American Federation of Musicians of United States and Canada, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION

63 Civ. 2548

EDDIE WITTSTEIN, BEN CUTLER, JULIUS SCHWARTZ, MARTY LEVITT, CLAUDE GARREAU, BERT FISHER, GEORGE AULD, LEO GRECO, HECTOR DERIENZO, MILTON FAROWITZ and MATT GILLESPIE,

Plaintiffs,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendant.

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63 Civ. 2442

JULIUS SCHWARTZ, BUDDY KANE, ROBERT CURTIS, JOHN C. ROSENMERKEL, WILLIAM ARNOLD, FRANCES BARON, LEONARD O. GASKIN, LOUIS V. SCHWARTZ, HERBERT WASSERMAN, JUDITH BREGMAN, SOLOMON KOSARIN and GLEN WILLIAMS,

Plaintiffs,

against

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Defendants.

LEVET, D. J.

These consolidated actions are brought by members of the defendant unions challenging certain recent fiscal enactments of both the parent Federation and its Local 802. The complaint in *Wittstein* challenges the procedure at the Fed-

eration's recent annual convention by which a resolution was enacted, purporting to abolish the so-called 10% traveling surcharge tax and substituting therefor an increase in the per capita dues of members of the Federation. The complaint in *Schwartz* is framed in two counts, the second of which is substantially identical to the cause of action asserted in the *Wittstein* complaint. This opinion is expressly directed to govern the disposition of the *Wittstein* complaint and the second count of the *Schwartz* complaint. The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, is sufficiently unrelated to the cause asserted in the *Wittstein* complaint to be the subject of a separate opinion.

The complaints challenge the procedure by which the resolution was adopted as violative of both the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 USC § 401 *et seq.*, and the defendant Federation's own Constitution and By-Laws. A declaratory judgment is sought seeking to enjoin the defendant Federation from carrying into effect the resolution on its effective date of January 1, 1964. The Federation has moved for summary judgment.

In order to place the action of the convention in its proper reference, it is necessary to briefly review the legal history of the Federation's 10% traveling surcharge. Article 15 of the Federation's By-Laws requires that Federation members who perform a "miscellaneous out-of-town engagement" be paid, but not to actually receive, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place. This additional amount is known as the "traveling surcharge." The orchestra leader does not actually turn over the additional 10% to his musicians (sidemen) because Federation By-Laws provide that the local in whose jurisdiction such engagement is performed must collect the traveling surcharge from the orchestra leader and transmit the amount to the Federation. Should the Local fail to

collect the surcharge from the leader, the leader is required to transmit the surcharge directly to the Federation. In a prior action brought by the plaintiff Cutler, the collection of the 10% traveling surcharge from Cutler, when engaged as an employer in the single engagement field, was held to be violative of Section 302 of the Taft-Hartley Act, 29 USC § 186. *Cutler* v. *American Fed. of Musicians*. 211 F. Supp. 433 (S.D.N.Y. 1962), aff'd 316 F. 2d 546 (2 Cir. 1963), petition for certiorari filed, 32 U. S. L. Week 3103 (U.S. Sept. 16, 1963) (No. 473). At the convention, the officers of the Federation sought to abolish the 10% traveling surcharge and substitute therefor an increase in the per capita dues of its 282,000 members.

STATUTES INVOLVED

The pertinent portion of the Act involved is as follows:

"SUBCHAPTER II.—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

"§ 411. Bill of rights; constitution and bylaws of labor organizations

"• • •

"(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

"• • •

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days'

written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

The defendant Federation is conceded to be a labor organization in an industry affecting commerce as defined in 29 USC § 402(i) and is a labor organization other than a local labor organization or a federation of national or international labor organizations within the meaning of 29 USC § 411(a)(3)(B). See *Cutler* v. *American Fed. of Musicians, supra.*

The relevant article of Federation's Constitution is Article 5 and of the Federation's By-Laws, Article 28. Article 5 is as follows:

"ARTICLE 5—REPRESENTATION AND DELEGATES

"All Locals of this Federation of one hundred and fifth members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the

Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members, as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

Article 28 of Federation's By-Laws in the pertinent parts are as follows:

"ARTICLE 28—CONVENTION PROCEEDINGS—THE ORDER OF BUSINESS SHALL BE:

"SECTION 1. Appointment of Credentials Committee by the President.
Report of Committee on Credentials.
Standing introduction of Delegates attending Convention for the first time.
Appointment of other committees.
Reading of rough minutes of previous session.
Report of officers.
Communications and bills.
Reports of committees.
Unfinished business.
New business.
Nomination and election of officers.
Installation of officers.
Reading of rough minutes.
Adjournment.

"SECTION 2. For Rules of Order, Robert's Revised Manual shall be the guide unless otherwise provided and the manner of voting shall be *viva voce*, unless otherwise ordered. The vote at elections or the vote on roll call shall be in accordance with Article V of the Constitution.

"SECTION 3. The recommendations made in the official report of the President, Secretary or Treasurer relative to any new law or to any advisable changes in existing laws shall be immediately referred to the Law Committee and shall not thereafter be considered in connection with the report of such officer.

"SECTION 4. Delegates or Locals desiring to introduce in the Convention any resolution or measure must forward same written and in duplicate to the International Secretary, not later than fifteen (15) days before the day set for the first session of the Convention.

"A. All such resolutions or measures shall be printed and distributed to the delegates at said first session.

"B. In addition, delegates may introduce resolutions until thirty (30) minutes after the closing morning session of the second day of the Convention by presenting same to the Chairman.

"C. All resolutions or measures shall be numbered consecutively and printed in compact pamphlet form.

"SECTION 5. At the annual Convention the President shall appoint the following committees: Finance, Measures and Benefits, Good and Welfare, Organization and Legislation, International Musician, President's Report, Secretary's Report, Location and such other committees as the Convention may direct. As soon as practicable after receiving the list of delegates, the President shall appoint from that list the Credentials Committee and the Law Committee, and from the members of said Law Committee a subcommittee of five to be known as the Appeals Committee.

"SECTION 6. • • •

"SECTION 7. The Committee on Credentials shall examine and report on the credentials of delegates. The chairman of the committee shall take charge of all documents appertaining to the duties of said committee, investigate and report upon the credentials of the delegates immediately after appointment, and the report of said committee shall be disposed of before any other business is transacted.

"A. When the Secretary receives credentials from the locals he shall, when acknowledging receipt of the same to the individual delegates, enclose a sticker which the delegate may attach to his luggage on which is inscribed words encouraging the use of live music.

"SECTION 8. The Committee on Finance shall annually inspect and investigate the financial affairs of the American Federation of Musicians and accounts of the Secretary and Treasurer of the Federation, as well as the books and accounts of all who may be entrusted with the receipt or expenditure of Federation funds, and shall make a full report in writing of its findings to the Convention of the Federation at which it was appointed.

"SECTION 9. All other committees created by the convention shall perform such duties as indicated by their title, and all resolutions introduced shall be referred by the President to the Committee he deems appropirate to receive and act upon such resolution.

"SECTION 10. Printed copies of the annual reports of the President, Secretary, Treasurer, Auditor and any resolutions to be submitted to the Convention by the International Executive Board, if possible, shall be mailed to the accredited delegates to the Convention of the Federation not earlier than three weeks

and not later than two weeks preceding the opening session of the Convention.

"* * * *

"SECTION 21. No alterations or amendments to the Constitution or By-Laws (except it is otherwise provided in the By-Laws or ordered by a Convention) shall be made unless proposed in writing, and said alterations or amendments must receive a majority vote of the delegates present to become a law, unless otherwise provided.

"SECTION 22. All amendments and additions to the laws passed by the Federation shall go into effect the fifteenth day of September succeeding the Convention which enacts them. Exempt therefrom are amendments and additions for the enforcement of which the Convention has designated another date than the fifteenth day of September."

As appears in 29 USC § 411(a)(3), "the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members except,—* * *" as provided by said Section 411(a)(3). These methods governing in the case of a labor organization such as defendant Federation are specifically set forth as follows:

"* * * (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express

> authority contained in the constitution and byalws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

THE CONVENTION'S VOTE

There are no genuine issues as to any material facts concerning the following: At an evening session of the convention commencing at 8:15 P.M. on June 12, 1963, the Joint Committee on Law and Finance submitted its report through Chairman Davis (Law) and Chairman Chanson (Finance) recommending passage of Recommendation No. 11 which *inter alia* abolished the 10% traveling surcharge and substituted therefor an increase in the per capita dues of Federation members. After some discussion and the transaction of other business, Recommendation No. 11 was called for vote. Two voice votes were had, after each of which the Chair was unable to determine whether the "ayes" or "nayes" predominated, stating: "The ayes and nayes appear to be of equal response." No further attempt was made to ascertain how the delegates voted either by a show of hands or by standing. Thereafter, Delegate Snider, alleging to be speaking in behalf of five locals, demanded a roll call vote in accordance with Article 5 of the Federation's Constitution, which provides:

> "On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members as per book of the Treasurer, A. F. of M. * * * Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

The Chair then stated: "* * * The roll call vote has been asked for. It's mandatory under the law. * * *" Delegate Tomei then inquired what procedure was to be

followed if "the delegates of the local are divided on the question." The Chair responded:

> "I'm advised, Borther Tomei, that on a split vote each would vote the number of the divisional. You understand, delegates, when you vote in a roll call vote you vote the total membership of your local. You have to divide up the membership of your local." (Scola aff. Oct. 9, 1963, Ex. A, p. 4)

In response to a request to explain what a roll call vote is, the Chair answered:

> "A roll call vote, ladies and gentlemen, is a vote of the total membership of a local. For example, the first local would be Number 1. Local number—the local One representative would rise to the microphone and say, 'Cincinnati votes as follows.' That would be recorded here. We go through the entire list of locals. That's the only way we can do it and we are required to do it under the law." (*ibid.*)

Again, prior to the vote, the Chair explained:

> "• • • If a Local has a thousand members and if one person speaks for that local, having assured this delegation that this (unintelligible words)—he stands up and votes. He names that (unintelligible word) local and the number." (Scola aff., id., p. 7)

Later, Secretary Ballard stated:

> "• • • The roll call vote allows the local to vote the membership of the entire local—the membership on which they pay per capita (unintelligible words). That means that Local Number 1 will vote 1,115 votes and so on down through the entire list." (Scola aff., id., p. 9)

The roll call vote was taken, which resulted in 158,068⅔ votes being cast in favor of Resolution No. 11, and 113,742⅓ votes in opposition. The Chair announced the vote and the session was adjourned at 2:30 A.M.

There are at least 12,381 members of the Federation who are members of more than one Local. They are classified as follows:

	Individual Members	Number of Different Locals to Which Members Belong	Duplicate Membership Voting Strength
	11,145	2	22,290
	1,074	3	3,222
	152	4	608
	6	5	30
	4	6	24
TOTALS	12,381		26,174

The defendant relies solely on the computed recorded vote as allocated to the respective Locals on a membership basis and on nothing else. (SM 119, Oct. 1, 1963)

THE ISSUE

The issue, therefore, is whether or not the procedure in acting on this resolution increasing the dues complied with Section 101(a)(3)(B)(i) of the Act, 29 U.S.C. § 411(a)(3)(B)(i). There is, of course, no contention that a referendum was taken, subsection (a)(3)(B)(ii), nor is there any contention that the majority vote of the members of the Executive Committee was taken pursuant to express authority to increase dues contained in the Constitution and By-Laws of such labor organization, subsection (a)(3)(B)(iii). The defendant contends that the vote as above mentioned and as set forth on pages 56-58 of the Official Proceedings complies with the statute (i.e., a passage "by a majority of the delegates voting at a regular convention"); the plaintiffs allege that it does not.

Non-Compliance with the Act

Purposes of the Act

One of the purposes of the Labor-Management Reporting and Disclosure Act of 1959 and particularly the so-called "Bill of Rights" (29 USC §§ 411-415) was "to insure union democracy." (Senate Report No. 187, 1959, U.S. Code Cong. & Ad. News, 2318.) In the House Report No. 741 one of the purposes stated was to "Require democratic procedures and safeguards within unions, designed to protect basic rights of union members." (1959 U. S. Code Cong. & Ad. News, 2424.) The Senate Report pointed out that effective measures to guarantee internal union democracy cannot be applied to all unions without the coercive powers of government (p. 2322); that "the financial conduct of labor unions and their officers is a proper concern of the Federal Government" and that the rules governing the conduct of the union's business such as dues and assessments payable by the members should be known to all members (p. 2324). It is obvious that the "intended beneficiary of the Labor-Management Reporting and Disclosure Act of 1959 is the union member." (O'Donoghue, The Bill of Rights—Responsibilities of Its Beneficiaries, 48 Geo. L. J. 257 (1959).)

Speaking of the above-mentioned House Committee Report No. 741, Freeman, District Judge, in *Horn* v. *Amalgamated Ass'n of Street Employees*, 194 F. Supp. 560, 561 (E. D. Mich. 1961) wrote:

> "This House Committee Report clearly shows that the reporting committee was concerned about instances of lack of 'internal union democracy' and proposed that effective measures for the protection of 'basic rights' could be applied only through powers of the Government. It is evident that the Bill of Rights of the Labor-Management Reporting and Disclosure Act of 1959 was the response of Congress to

> this concern in which the basic rights to be protected as *specifically set out.* • • •"

In an opinion concerning a resolution of a local union to increase dues, Van Dusen, D. J., wrote:

> "The purpose of the Labor-Management Reporting and Disclosure Act (29 U.S.C.A. § 401ff.) is to assure that 'labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.' 29 U. S. C. A. § 402(a). • • • Brooks v. Local 30, United Slate Workers, 187 F. Supp. 365, 367 (E. D. Pa. 1960).

In *Nelson v. Johnson*, 212 F. Supp. 233, 248 (D. Minn. 1962), particularly involving the fiduciary duties of union officials, Larson, District Judge, in commenting on the purposes of the Act, among other things said:

> "• • • There can, in short, be little doubt that Congress meant to lay its hands upon irregular internal affairs. See e.g., 105 Cong. Rec. 5489 (daily ed. April 16, 1959) (remarks of Senator Ervin); 45 Va. L. Rev. 203-206 (1959) (remarks of Senator Kennedy); see generally Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960). • • •"

The Congressional declaration of findings, purposes and policy contained in Title 29 USC § 401 indicates the intent of Congress to require labor organizations and their officials to adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organization. To assist in the effectuation of this purpose, Congress was not content to pronounce general

platitudes but, instead, at least as to increased dues, provided explicit and exclusive methods by which such increases might be authorized. Defendant Federation claims that it produced an equivalent or even a superior or more democratic method, but that, even if true, is not determinative of the validity of the process observed.

In like fashion counsel may well argue that a national direct primary of all party voters might be a more democratic method of selecting a Presidential nominee that the convention method and that a direct poll of all voters would be a more democratic method of Presidential election than the present electoral college system. However, it is not the prescribed method and I believe that there is no doctrine of "equivalents" applicable here. As far as democracy is concerned, the second method, that is, membership referendum by secret ballot, is obviously more democratic than the process actually used.

Although proponents of the bill and others recognized the desirability of minimum interference by government in the internal affairs of the union, the fact is that a number of the provisions of the "Bill of Rights" are "express statutory restrictions and requirements which supersede and invalidate all existing contrary provisions in union-governing laws and must be applied to the form prescribed by the law whether or not a majority of the union membership so desires." Hickey, The Bill of Rights of Union Members, 48 Geo. L. J. 226 (1959). As Mr. Hickey points out, "[b]oth the Senate and the House furthered the intrusion of internal union affairs by incorporating the bill-of-rights provision" (id. at 230) and the third method of increasing dues (Title 29 USC § 411(a)(3)(B)(iii)) was inserted by way of amendment to eliminate the necessity of the other more expensive requirements of special conventions and national referenda. (id. at 242)

Title 29 USC § 411(b) provides: "Any provision of the constitution and by laws of any labor organization which

is inconsistent with the provisions of this section shall be of no force and effect." "When one becomes a union member, he agrees to be governed by the union constitution, by-laws and rules *not inconsistent with rights and procedures established by the Act*" (Emphasis inserted). *Cleveland Orchestra Comm.* v. *Cleveland Fed. of Musicians*, 303 F. 2d 229, 230 (6 Cir. 1962).

The pertinent provision of the Act requiring "a majority vote of the delegates voting at a regular convention" is clearly mandatory. The Act definitely limits the manner of action by stating that the rate of dues and initiation fees, etc. shall not be increased *except* by the methods specified.

As enunciated by La Buy, District Judge:

> "* * * A statute which directs performance of a certain thing in a particular manner, bears the implication that the action taken shall not be carried out otherwise than as directed nor by a different person. As was said in Botany Worsted Mills v. United States, 278 U.S. 282, 289, 49 S. Ct. 129, 132, 73 L. Ed. 379: 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Raleigh, etc., R.R. Co. v. Reid, 13 Wall. 269, 270, 20 L. Ed. 570; Scott v. Ford, 52 Or. 288, 296, 97 P. 99.'" Toledo, P. & W. R.R. v. Stover, 60 F. Supp. 587, 593 (S. D. Ill. 1945).

In construing the Act, the court should first look to a plain-meaning of words as they have been actually enacted by Congress. *Hughes* v. *Local 11, International Ass'n of Bridge Workers*, 287 F. 2d 810, 818 (3 Cir.), cert. denied 368 U.S. 829 (1961).

Ranes v. *Office Employees Union*, 317 F. 2d 915 (7 Cir. 1963) has no bearing on the issue here. It held merely that a valid passage by an international union of a resolution

increasing the dues of all members (i.e., including those of all Local members) did not require action by the Local union under Section 101(a)(3)(A) of the Act, 29 USCA § 411(a)(3)(A).

It is my conclusion that the convention failed to comply with the mandatory provisions of Ttitle 29 USC § 411(a)(3)(B)(i) and that as a result I am forced to declare the action taken increasing dues to be void. Consequently, there is no necessity of determining the alleged violations of the Constitution or By-Laws of the Federation. It is thus evident that the motion of defendants for summary judgment must be denied.

Although the plaintiffs made no cross-motion for summary judgment, the court has authority to grant summary judgment for plaintiffs. *Local 33, Int. Hod Carriers* v. *Mason Tenders Council*, 291 F. 2d 496 (2 Cir. 1961); *Bell* v. *Waterfront Commission of New York*, 183 F. Supp. 175 (S. D. N. Y. 1960), aff'd 279 F. 2d 853 (2 Cir. 1960); *Dickhoff* v. *Shaughnessy*, 142 F. Supp. 535 (S. D. N. Y. 1956); *Hennessey* v. *Federal Security Administrator*, 88 F. Supp. 664 (D. Conn. 1949); 6 Moore, Federal Practice ¶ 56.12 (2 ed. 1953).

Consequently, summary judgment for plaintiffs is granted to the following extent:

(1) A declaratory judgment declaring that that portion of Recommendation No. 11 increasing the per capita dues of Federation members was invalidly enacted under 29 USC § 411(a)(3)(B)(i);

(2) The defendants Federation and Local 802 are permanently enjoined from carrying into effect the provisions of Recommendation No. 11 increasing the per capita dues of Federation members.

The first count in *Schwartz* challenges a provision of Local 802's By-Laws which, for the present purposes, as

heretofore stated, is sufficiently unrelated to the cause asserted in the complaint herein to permit the entry of final judgment with respect to the *Wittstein* action and the second count in the *Schwartz* action. Accordingly, I expressly direct the entry of a final decree and judgment with respect to *Wittstein* complaint and the second cause of action in *Schwartz*. There is no just reason for delay. All the facts pertinent to the decision on the Federation's actions have been adduced. There is, accordingly, no just reason why final judgment should not be entered. See Fed. R. Civ. P. 54(b); *Backus Plywood Corp.* v. *Commercial Decal, Inc.*, 317 F. 2d 339 (2 Cir. 1963), cert. denied, 32 U. S. L. Week 3153 (U. S. Oct. 22, 1963).

Settle order and judgment with costs against the Federation within ten (10) days from the date hereof on two (2) days notice.

Dated: New York, N. Y.
October 28, 1963.

RICHARD H. LEVET
United States District Judge

APPENDIX C

Statutory and Constitutional Provisions Involved

United States Constitution:

Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 *et seq.*, 29 U.S.C. § 401 *et seq.*:

TITLE I:

Sec. 101(a)(1), 29 U.S.C. § 411(a)(1):

"*Equal Rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

Sec. 101(a)(3), 29 U.S.C. § 411(a)(3):

"*Dues, Initiation Fees, and Assessments.*—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—

"(A) • • •

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

TITLE IV:

Sec. 401(e), 29 U.S.C. § 481(e): "In any election required by this section which is to be held by secret ballot • • • [e]ach member in good standing shall be entitled to one vote. • • • The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title."

Sec. 401(f), 29 U.S.C. § 481(f): "When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers."